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Khazanah Jaya Sdn Bhd v Abdul Rahman bin Ahmad (carrying on business under the name of Misi Mega Enterprise)

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HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-12BNCC-3–01 OF 2016
KHADIJAH IDRIS JC
18 JULY 2017

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Civil Procedure — Stay of execution of judgment — Application for — Sessions court judge allowed respondent's claim against appellant for outstanding friendly loan — High Court dismissed appellant's appeal — Appellant applied for stay of execution of judgment pending appeal to Court of Appeal — Whether there were special circumstances

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Contract — Oral agreement — Loan — Respondent filed action against appellant claiming for outstanding friendly loan — Sessions court judge allowed appellant's claim — Whether money given by respondent to appellant was friendly loan or consideration for appellant for having secured several projects/contracts for respondent — Whether there was oral agreement between parties — Whether respondent proven its case — Whether appellate court should intervene with decision of sessions court judge

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The respondent was one Abdul Rahman bin Ahmad, trading as Misi Mega Enterprise ('MME') and the appellant was a body corporate under the Companies Act 1965. The respondent filed an action at the sessions court against the appellant claiming for RM550,000 being a friendly loan given to the appellant. The respondent's case was that, based on the discussion between the respondent and the appellant's director, one Tan Boon Keong, the respondent had given the appellant a friendly loan amounting to RM600,000 but to date, the appellant had only paid RM50,000 and the appellant refused to pay the balance of RM550,000. In defence, the appellant averred that the amount RM550,000 was paid to them by the respondent as a consideration for the appellant procuring certain projects for the respondent. In addition to that, the appellant averred that RM50,000 was paid to the respondent's account as a commission for one Sim Yong Pang ('SP3'), one of MME's owner. The respondent called three witnesses to prove its case, namely, the respondent himself, Khairil Azuan ('SP2') and SP3 whereas the appellant called its Chief Operating Officer, Lee Yeow Tuck ('SD1') as its sole witness. The sessions court judge ('the SCJ') allowed the respondent's claim and held that the RM550,000 and RM50,000 were payments made pursuant to a friendly loan given by the respondent to the appellant ('the said findings'). Aggrieved by the decision, the

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appellant filed the present appeal ('the appellant's appeal'). At end of the appeal, the court agreed with the decision of the SCJ and consequently dismissed the appeal. The appellant had filed an appeal against the court's decision and pending hearing of the appeal, the appellant filed an application for stay of the execution of the judgment for the respondent ('encl 22'). The issue in dispute was whether the amount RM600,000 was a friendly loan given to the appellant or a consideration for the appellant for having secured several projects/contracts to SP3 at his request.

Held, dismissing the appellant's appeal and allowing the appellant's application in encl 22:

(1) On the facts, the decision of the SCJ was not plainly wrong or unreasonable. It was evident from her judgment the SCJ had evaluated and assessed the oral testimony adduced and the demeanor of the witnesses. Based on the testimony of the witnesses as recorded in the notes of proceedings and the SCJ reasoning for the said findings, the court found no justification to intervene with the said findings. The SCJ found that the evidence given by: (a) SP3 that the appellant paid only RM50,000 to settle the friendly loan and even though numerous demand were made for the repayment of the balance RM550,000, the appellant failed to do so; and (b) SP2 that the RM50,000 was paid by the appellant to MME and not to SP3, were affirmative and accepted the evidence (see paras 17, 19–21 & 32).

(2) The fact that there was no written document in respect of the friendly loan did not in any way jeopardise the respondent's case. Under the Contracts Act 1950, a verbal contract may be valid and enforceable so long as it has all the requirements of a valid contract as required under the law. In the present case, there was ample evidence to show the oral agreement made between SP3 on behalf of the MME and Tan Boon Keong on behalf of the appellant in respect of the friendly loan. Therefore, the respondent had proven its case and the burden shifted on the appellant to rebut the respondent's case. Based on the testimony of SD1, it was clear as day that SD1 had no knowledge regarding the commission nor the various projects pleaded in the appellant's defence. Therefore, the SCJ was correct in dismissing the appellant's defence (see paras 22 & 24–26).

(3) Taking into consideration the facts as a whole, the nugatory issue which was founded on unchallenged oral testimony of the respondent and his witnesses at the full trial and the appellant's willingness and capability to provide security to guarantee the respondent's immediate remedy (in the event the appellant's appeal against the judgment for respondent was dismissed), were special under the circumstances and therefore the status quo should be preserved (see para 45).

[Bahasa Malaysia summary

Responden adalah seorang bernama Abdul Rahman bin Ahmad, berniaga sebagai Misi Mega Enterprise ('MME') dan perayu adalah badan korporat di bawah Akta Syarikat 1965. Responden memfailkan tindakan di mahkamah sesyen terhadap perayu dengan menuntut sebanyak RM550,000 sebagai pinjaman persahabatan kepada perayu. Kes responden adalah bahawa, berdasarkan perundingan di antara responden dan pengarah perayu, seorang bernama Tan Boon Keong, responden telah memberikan perayu pinjaman persahabatan berjumlah kepada RM600,000 tetapi sehingga hari ini, perayu hanya membayar RM50,000 dan perayu enggan membayar baki sebanyak RM550,000. Dalam pembelaan, perayu berhujah bahawa jumlah RM550,000 tersebut dibayar kepada mereka oleh responden sebagai balasan kerana perayu mendapatkan projek-projek tertentu untuk responden. Selanjutnya, perayu berhujah RM50,000 yang dibayar kepada akaun responden sebagai komisen untuk seorang bernama Sim Yong Pang ('SP3'), salah seorang pemilik MME. Responden memanggil tiga saksi untuk membuktikan kesnya, iaitu, responden sendiri, Khairil Azuan ('SP2') dan SP3 sementara perayu memanggil Ketua Pegawai Operasinya, Lee Yeow Tuck ('SD1') sebagai satu-satu saksinya. Hakim mahkamah sesyen ('HMS') membenarkan tuntutan responden dan memutuskan bahawa RM550,000 dan RM50,000 adalah bayaran-bayaran yang dibuat berikutan kepada pinjaman persahabatan yang diberikan oleh responden kepada perayu ('dapatan tersebut'). Tidak puas hati dengan keputusan, perayu memfailkan rayuan ini ('rayuan perayu'). Di akhir rayuan, mahkamah bersetuju dengan keputusan HMS dan akibatnya menolak rayuan tersebut. Perayu telah memfailkan rayuan terhadap keputusan mahkamah dan sementara menunggu pendengaran rayuan tersebut, perayu memfailkan permohonan untuk penangguhan pelaksanaan penghakiman untuk responden ('lampiran 22'). Isu yang dipertikaikan adalah sama ada jumlah RM600,000 adalah pinjaman persahabatan yang diberikan kepada perayu atau balasan untuk perayu kerana mendapatkan beberapa projek/kontrak kepada SP3 atas permohonannya.

Diputuskan, menolak rayuan perayu dan membenarkan permohonan perayu dalam lampiran 22:

(1) Atas fakta, keputusan HMS tidak salah atau tidak munasabah. Ia jelas daripada penghakiman beliau, HMS telah menilai dan menaksir keterangan lisan yang dikemukakan dan sikap saksi-saksi. Berdasarkan keterangan saksi-saksi seperti yang direkodkan di dalam nota-nota prosiding dan alasan-alasan HMS bagi keputusan tersebut, mahkamah mendapati tiada justifikasi untuk mencelah dengan dapatan tersebut. HMS mendapati bahawa keterangan yang diberikan oleh: (a) SP3 bahawa perayu hanya membayar RM50,000 untuk menyelesaikan pinjaman persahabatan dan walaupun banyak permintaan telah dibuat untuk bayaran balik baki RM550,000, perayu gagal berbuat sedemikian;

dan (b) SP2 bahawa RM50,000 dibayar oleh perayu kepada MME dan bukan kepada SP3, adalah afirmatif dan menerima keterangan tersebut (lihat perenggan 17, 19–21 & 32).

(2) Fakta bahawa tidak terdapat dokumen bertulis berkaitan pinjaman persahabtan tidak dengan apa-apa cara membahayakan kes responden. Di bawah Akta Kontrak 1950, kontrak lisan mungkin menjadi sah dan berkuat kuasa sekiranya ia mempunyai kesemua keperluan kontrak sah seperti ynag dikehendaki di bawah undang-undang. Dalam kes ini, terdapat keterangan yang kukuh untuk menunjukkan perjanjian lisan yang dibuat di antara SP3 bagi pihak MME dan Tan Boon Keong bagi pihak perayu berkaitan pinjaman persahabatan tersebut. Oleh itu, responden telah membuktikan kesnya dan beban berubah ke atas perayu untuk mematahkan kes responden. Berdasarkan keterangan SD1, ia adalah jelas bahawa SD1 tidak mempunyai pengetahuan berkaitan komisen ataupun pelbagai projek yang dirayukan di dalam pembelaan perayu. Oleh itu, HMS adalah betul dalam menolak pembelaan perayu (lihat perenggan 22 & 24–26).

(3) Mengambil kira fakta secara keseluruhan, isu tidak berguna yang berasaskan atas testimoni lisan responden yang tidak dicabar dan saksi-saksinya di perbicaraan penuh dan kesediaan dan keupayaan perayu untuk memperuntukkan sekuriti untuk menjamin remedi segera responden (jika rayuan perayu terhadap penghakiman untuk responden ditolak), adalah khas di bawah keadaan dan oleh itu *status quo* perlu dipelihara (lihat perenggan 45).]

Notes

For a case on loan, see 3(4) *Mallal's Digest* (5th Ed, 2015) para 6257.
For cases on application for stay of execution of judgment, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 8902–8963.

Cases referred to

Anuar bin Mat Amin v Abdullah bin Mohd Zain [1989] 3 MLJ 313, HC (refd)
China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (folld)
Chong Kow v Kesavan Govindasamy [2009] 8 MLJ 41, HC (distd)
Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627; [1996] 4 CLJ 1, CA (not folld)
Kam Seng Realty Sdn Bhd v Dato Tai Fatt Yew & Anor [2012] 7 MLJ 825, HC (distd)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257, FC (refd)
Lee Ah Chor v Southern Bnak Berhad [1991] 1 MLJ 428, SC (refd)

A *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49, CA (refd)
Network Pet Products (M) Sdn Bhd v Royal Canin SAS & Anor [2013] 8 MLJ 713; [2013] 2 AMCR 908, HC (not folld)
Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd [2012] 4 MLJ 149;
B [2012] 1 LNS 1416, CA (folld)
P' ng Hun Sun v Dato' Yip Yee Foo [2013] 6 MLJ 523; [2013] 2 AMCR 350, CA (distd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (folld)
State Government of Perak v Muniandy [1986] 1 MLJ 490, SC (refd)
C *Thong Foo Ching & Ors v Shigenori Ono* [1998] 4 MLJ 585; [1998] 4 CLJ 674, CA (refd)

Legislation referred to

Companies Act 1965
D Contracts Act 1950 ss 135, 183
Evidence Act 1950 s 101
Registration of Businesses Act 1956 s 8

Chia Wen Chow (Chia Wen Chow & Assoc) for the plaintiff.
E *Chew Chang Min (Chew Chang Min) for the defendant.*

Khadijah Idris JC:

INTRODUCTION

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[1] At the sessions court, the plaintiff's claim for RM550,000 being a friendly loan given to the defendant was allowed with costs. The defendant's appeal to this court against the decision of the sessions court judge ('SCJ') was dismissed. The defendant appealed against my decision confirming the SCJ
G decision allowing judgment in favour of the plaintiff (judgment for the plaintiff). The appeal against the judgment for plaintiff is registered as Court of Appeal Civil Appeal No W-04(NCC)(W)-254–07 of 2016.

[2] Pending the outcome of the appeal to the Court of Appeal the
H defendant filed an application for stay of execution of the judgment for the plaintiff. I allowed the application for stay ('stay order'). The plaintiff appealed against the stay order. The appeal is registered as Court of Appeal Civil Appeal No W-04(IM)(NCC)-319–09 of 2016.

I **[3]** This judgment deals with both the appeals. The parties will be referred to as they were in the sessions court.

APPEAL AGAINST JUDGMENT FOR THE PLAINTIFF (COURT OF APPEAL CIVIL APPEAL NO W-04(NCC)(W)-254–07 OF 2016)

Parties

[4] The plaintiff is one Abdul Rahman bin Ahmad, trading as Misi Mega Enterprise ('MME') which is a sole proprietorship. The defendant is a body corporate incorporated under the Companies Act 1965 ('the CA 1965').

Factual background

[5] According to the plaintiff around 20 July 2011, at the defendant's request, the plaintiff lend to the defendant a sum of RM600,000 which is a friendly loan without bearing interest. It was agreed by the parties that the defendant will repay the loan when demanded by the plaintiff or within a reasonable time period. Discussions relating to the friendly loan was carried out between Sim Yong Pang ('Pang') on behalf of the plaintiff and Tan Boon Keong on behalf of the defendant. The amount RM600,000 was debited from the plaintiff's account with CIMB Bank Bhd No 0211-0005201-05-08 and credited into the defendant's account with Malayan Banking Bhd No 514075702595. The plaintiff stated the defendant had paid an amount of RM50,000 via CIMB cheque No 091895 dated 4 April 2013. Numerous demands were made by the plaintiff for the repayment of the balance sum of RM550,000 but the defendant has failed, refuse and/or neglect to repay the said outstanding balance of the friendly loan.

[6] The defendant admitted an amount of RM600,000 was credited into its account with Malayan Banking Bhd No 514075702595. The defendant also admited an amount of RM50,000 was paid to the plaintiff via CIMB cheque No 091895 dated 4 April 2013.

[7] However the amount RM600,000 paid by the plaintiff to the defendant and the amount RM50,000 paid by the defendant to the plaintiff was entirely for a different purpose. It is the defendant's pleaded case that the amount RM600,000 was paid to the defendant by the plaintiff as a consideration for the defendant procuring certain projects or contracts for the plaintiff including the IKBN Kuala Langat Project, for electrical supply and installation works at ILP Sandakan and IKBN Temerloh. The amount RM550,000 was paid to the defendant as procurement fees and RM50,000 was paid to Pang (SP3). According to the defendant, Pang's commission was paid to the plaintiff as requested by Pang himself. Discussions in respect of the procurement fees were carried out between the defendant and Pang. The defendant claims they do not

know and has never dealt with the plaintiff relating to any matter whatsoever.

[8] According to the defendant they had given several projects to Pang (SP3) who has used several entities to carry out the projects such as:

(a) Fareast Autoparts Engineering Trading ('Fareast Trading'). According to the defendant the projects carried out by Fareast Trading were given to it by Warni Kukuh Sdn Bhd and Jalinan Rakyat Sdn Bhd; and

(b) LSHY Electrical Engineering & Air Cond ('LSHY'). Projects carried out by LSHY were given to it by Komponen Utama Sdn Bhd, Jalinan Rakyat Sdn Bhd and Sinar Bekal Sdn Bhd.

Accordingly the defendant denies owing the plaintiff the sum of RM550,000 as they are entitle to the said sum.

Issues

[9] Based on the pleadings the issue that require determination is whether the amount RM600,000 is a friendly loan given to the defendant or a consideration for the defendant for having secured several projects/contract to Pang (SP3) at his request which includes IKBN Kuala Langat.

The defendant's memorandum of appeal

[10] The defendant's grounds of appeal as stated in their memorandum of appeal may be summarised as follows:

(a) the SCJ erred in law and in fact when she failed to rule that the onus is on the plaintiff to call Tan Boon Keong as their witness. As a result of such failure the plaintiff failed to discharge the burden of proving that the RM550,000 is a friendly loan. The SCJ also failed to consider that the plaintiff has never dealt with the defendant or its director Tan Boon Keong;

(b) the SCJ erred in law and in fact when she failed to consider that the plaintiff's claim is against public policy and therefore illegal because the plaintiff has deceived the authorities regarding its bumiputera status;

(c) the SCJ erred in law and in fact when she failed to consider that illegality need not be pleaded; and

(d) the SCJ erred in law and in fact when she failed to dismiss the plaintiff's claim under s 8 of the Registration of Businesses Act 1956 (failure to register Khairil Azuan (SP2) and Pang (SP3) as the owner of MME), ss 135 and 183 (which provides agent cannot personally enforce contracts entered into by principal) of the Contracts Act 1950.

[11] The plaintiff raised objection to the grounds at para 10(b)–(d) as the plaintiff claims these are new issues which were not pleaded by the defendant and which were not agreed by parties as issues to be tried. These issues were not raised at any stage of the trial and were only raised by the defendant in their written submission.

[12] Having perused the defendant's pleadings, it is obvious no facts and issues were pleaded in relation to the ownership of MME and the plaintiff's role which the defendant claims to be an agent. It is a cardinal rule that parties are bound by their pleadings and are not allowed to adduce facts which they had not pleaded (*State Government of Perak v Muniandy* [1986] 1 MLJ 490; *Anuar bin Mat Amin v Abdullah bin Mohd Zain* [1989] 3 MLJ 313). Where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal (*Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428).

[13] The defendant pointed out these issues arose when witness statement were exchanged and when plaintiff amended the statement of claim on the first day of trial. Based on the notes of proceedings (pp 25–34 *rekod rayuan Bahagian* B) and the amended statement of claim dated 24 November 2015, the amendment made was in relation to details of the friendly loan and the relationship of the plaintiff, Khairul Azuan (SP2) and Pang (SP3) in MME. The amendments made are as follows:

PERNYATAAN TUNTUTAN TERPINDA

[1] ~~Plaintif~~, Misi Mega Enterprise ['MME'] yang dinamakan di atas, mempunyai alamat penyampaiannya di No. 212, Taman Pasu, 06000 Jitra, Kedah.

[1.1] MME adalah didaftarkan atas nama Abdul Rahman Bin Ahmad ['Abdul Rahman'] sebagai pemilik tunggal;

[1.2] Walau bagaimanapun, Abdul Rahman tersebut tidak langsung terlibat dan campur tangan dalam segala urusan dan hal ehwal perniagaan MME;

[1.3] MME adalah ditubuhkan oleh Abdul Rahman atas permintaan anak lelakinya yang bernama Khairil Azuan Bin Abdul Rahman ['Khairil Azuan'] dan bagi tujuan Khairil Azuan dan/atau seorang bernama Sim Yong Pang ['Sim'] menjalankan perniagaan yang berkaitan dengan 'peralatan dan jentera' (equipment and machineries), 'servis dan penyelenggaraan mesin dan jentera', 'system M&E', 'renovasi'; dan

[1.4] Sebelum MME didaftarkan, Khairil Azuan dan/atau Sim tersebut telah menjalankan perniagaan tersebut di bawah nama firma/syarikat lain.

[3] Atas permintaan Defendan, ~~Plaintif~~ MME telah pada sekitar 20hb Julai 2011 memberikan satu pinjaman persahabatan tanpa faedah berjumlah RM600,000.00 sahaja kepada Defendan, butir-butir penuh adalah diketahui oleh Defendan. Adalah dipersetujui oleh kedua-dua pihak bahawa Defendan akan membayar balik RM600,000.00 tersebut kepada ~~Plaintif~~ MME apabila dituntut oleh ~~Plaintif~~ MME

dan/atau dalam jangkamasa yang munasabah.

Butir-butir

[a] Pada sekitar awal Julai, 2011, Defendan telah meminta MME agar memberikan satu pinjaman persahabatan tanpa faedah sejumlah RM600,000.00 kepadanya;

[b] Permintaan Defendan telah diterima oleh MME dan kedua-dua pihak bersetuju bahawa Defendan dikehendaki membayar balik RM600,000.00 tersebut kepada MME apabila dituntut dan/atau dalam jangkamasa yang munasabah;

[c] Kesemua urusan perbincangan tentang pinjaman persahabatan tersebut adalah dikendalikan oleh Tan Boon Keong bagi pihak Defendan dan Sim bagi pihak MME;

[d] Pada lebih kurang 20hb Julai 2011, MME telah membayarkan pinjaman persahabatan sebanyak RM600,000.00 tersebut kepada Defendan melalui cara debit akaun MME di CIMB Bank Berhad di bawah No Akaun 0211-0005202-05-8. Wang tersebut telah dimasukkan ke dalam akaun Defendan di Malayan Banking Berhad Akaun No 514075702595.

[4] Atas tuntutan ~~Plaintif~~ MME, Defendan sehingga hari ini hanya menjelaskan wang sebanyak RM50,000.00 sahaja melalui CIMB Cek 071895 bertarikh 4hb April, 2013 sebagai sebahagian (kecil) penyelesaian pinjaman persahabatan tersebut kepada ~~Plaintif~~ MME dan Defendan masih berhutang kepada ~~Plaintif~~ MME wang sebanyak RM550,000.00 sebagai baki pinjaman persahabatan tersebut.

[5] Walaupun pelbagai tuntutan dibuat oleh ~~Plaintif~~ MME terhadap Defendan, termasuk surat tuntutan peguamcara ~~Plaintif~~ MME bertarikh 4/8/2014, Defendan sehingga hari ini masih gagal, enggan dan/atau abai menjelaskan jumlah wang RM550,000.00 atau mana-mana bahagiannya kepada ~~Plaintif~~ MME.

[14] If the defendant has issues with the additional facts newly incorporated into the statement of claim via the amendment, the defendant should have amended their defence to respond to the new additional facts in relation to the said relationship and the business of MME. In fact when the plaintiff's amendment was allowed by the court, the defendant was given the opportunity to amend their defence. Obviously they did not do that. Without taking the proper action to amend its defence to raise facts in relation to the issue of ownership, agency or the bumiputera status of MME the defendant cannot be allowed take up those issues in their submission. To allow the defendant to do so will prejudice the plaintiff. As such those new issues were not considered by this court.

The law

[15] In so far as the function and appellate power of the court I am guided by the principles established in a string of authorities:

(a) in *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163 it was held:

> [2] It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the factual findings of the court below be disturbed by the appellate court unless it appears that those findings are clearly wrong; and it is even more undesirable to do so where the conclusions reached, to a large extent, depended on the credibility of the witnesses and the impression formed by the court which has seen them and judged their honesty and accuracy.
>
> [3] However, there is clear authority that a distinction can be drawn between the finding of a specific fact which depends upon the credibility of witnesses, and a finding of fact which depends upon interferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial judge's findings of fact and form an independent opinion. Thus, in cases where there is no question of the credibility or reliability of any witness, or where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to review and evaluate the evidence as the trial judge ...

(b) in *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149; [2012] 1 LNS 1416 the court held:

> [4] Both parties began their submissions with the clear understanding that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts in the trial judge. They cited this court in *Sivalingam Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA). This general principle was adopted by this court in *Lee Ing Chin & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 and other cases. It is clear it is a general principle and that there are exceptions when appellate intervention is necessary to ensure justice is done. In the cases regularly cited, the terms 'intervene' and 'interfere' are used interchangeably. A more precise use of terminology would remove much unnecessary confusion and argument. It is more precise to say that an appellate court will intervene to correct an injustice when it is shown to have occurred in the trial court, but it would be an interference otherwise.
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> [5] The following from the dissenting speech of Lord Pearce in *Onnasis & Anor v Vergottis* [1968] 2 Lloyds Rep 403, was quoted in *Sivalingam* as containing a valuable reminder:
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> > The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or a miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of the wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of their respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant may in the end fail to secure a judgment in his favour: But

A the fact that the right party seems to have succeeded in the court below will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases. Such matters are questions of degree.

(c) in the case of *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ B 395 it was held:

> It is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the trial court to which the law entrusts the primary task of evaluation of the evidence. However the appellate court has a duty to intervene where a trial court has so fundamentally misdirected itself, that one C may say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

The court findings

D **[16]** It is not disputed by the parties that the plaintiff has paid an amount of RM600,00 to the defendant and that the defendant has paid to the plaintiff an amount of RM50,000. The issue to be determined is the reason those payments were made.

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[17] The plaintiff called three witnesses to prove its case, namely, the plaintiff himself (SP1), Khairil Azuan (SP2) and Pang (SP3). The defendant called its Chief Operating Officer Lee Yeow Tuck (SD1) as its sole witness. The SCJ has evaluated the oral testimony given by the witnesses and the F documentary evidence tendered in court and concluded that the RM550,000 and RM50,000 were payments made pursuant to a friendly loan given by the plaintiff to the defendant. Such conclusion were finding of facts based on the evidence adduced. Having considered the testimony of the witnesses as recorded in the notes of proceedings and the SCJ reasoning for such findings I G found no justification for this appellate court to intervene with such findings.

[18] The plaintiff's case is grounded on the dealings held between Pang (SP3) who is a partner of MME and Tan Boon Keong who is a director of the defendant. Pang (SP3) in his examination-in-chief testified that Tan Boon H Keong had requested for a friendly loan of RM600,000 around July 2010. According to him at that point in time MME was about to receive payment under a contract in respect of works done by MME for Warni Kukuh Sdn Bhd. Pang discussed the request with Khairil Azuan (SP2) and it was agreed for a sum of RM400,000 to be loaned. However due to Tan Boon Keong's insistence I MME agreed for the amount as requested by Tan. It is the plaintiff's case that Tan Boon Keong agreed that the amount loaned will be repaid when MME demand for it.

[19] Pang (SP3) then asked Kharil Azuan (SP2) to make the payment of

RM600,000 from MME's account with CIMB into the defendant's account with Maybank on 20 July 2011. Pang (SP3) testified that the defendant paid only RM50,000 to settle the friendly loan and even though numerous demand were made for the repayment of the balance RM550,000 the defendant failed to do so. Finally on MME's instruction their solicitor issued a demand dated 4 August 2014 and subsequently followed by this suit in 2016.

[20] Khairil Azuan (SP2) who is the managing director of MME testified he completed the form 'Borang Permohonan Kiriman Wang' (P2) for purpose of making the RM600,000 loan to the defendant. He confirmed he had caused for the amount of RM600,000 to be debited from MME account with CIMB and credited into the defendant's account. MME's statement of account with CIMB for the month of July (P3) had recorded the transaction. Khairil Azuan (SP2) testified the RM50,000 was paid by the defendant to MME and not to Pang (SP3).

[21] The SCJ, having considered the testimony of Khairil Azuan (SP2) and Pang (SP3), found the evidence given were affirmative and accepted their evidence. The SCJ made the following findings:

> 19. Keterangan-keterangan afirmatif ini perlulah mahkamah terima sebagai keterangan yang benar. Memang benar bahawa peguam defendan telah menyoal balas saksi-saksi plaintif dengan mengatakan bahawa bayaran tersebut bukanlah seperti yang didakwa oleh Pang dan Khairul Azuan, tetapi cadangan-cadangan peguam defendan ini telah dinafikan oleh saksi-saksi tersebut. Oleh yang demikian, setakat keterangan di peringkat kes plaintif, jelas menunjukkan bahawa RM600,000 itu adalah bayaran MME kepada defendan sebagai pinjaman persahabatan dan RM50,000 adalah bagi bayaran balik pinjaman tersebut. Tiada keterangan yang menunjukkan bahawa wang RM550,000 adalah bayaran komisen atau fee perolehan kepada defendan dan RM50,000 adalah komisen kepada Pang seperti yang didakwa oleh defendan.
>
> 20. Saya juga mempercayai keterangan Pang dan Khairul Azuan sebagai keterangan yang benar dan kredibel. Saya tidak mempunyai alasan untuk menolak keterangan tersebut kerana keterangan-keterangan mereka adalah keterangan yang munasabah. Keterangan-keterangan oleh Pang dan Khairul Azuan di mahkamah adalah secara terus. Saksi-saksi ini terutamanya Pang telah menjalani proses disoal balas oleh peguam defendan berkenaan tujuan wang sebanyak RM600,000 itu dimasukkan ke dalam akaun defendan dan mengapa cek sebanyak RM50,000 itu dikeluarkan oleh defendan atas nama MME. Setelah Pang selesai memberi keterangannya, saya mendapati keterangannya di mahkamah kekal utuh berkenaan tujuan bayaran wang itu.

[22] Khairil Azuan (SP2) and Pang (SP3) admitted there is no written document to prove the RM600,000 was given as a friendly loan. The fact there was no written document in respect of the friendly loan does not in any way jeopardise the plaintiff's case. It must be remembered it is not a requirement

under the Contracts Act 1950 for a contract to be valid or enforceable the contract must be writing or must be documented. In other words a verbal contract may be valid and enforceable so long as it has all the requirements of a valid contract as required under the law.

[23] The defendant cited a string of authorities in respect of claim of friendly loan to support their case. However those cases cited can be distinguished in so far as the facts are concerned:

(a) in *Chong Kow v Kesavan Govindasamy* [2009] 8 MLJ 41 the court found it difficult to accept that the plaintiff being a businessman have loaned such a large sum of money (RM270,000) to Han whom he has come to know only for a short period without it being evidenced by the necessary documentation. Also in *P'ng Hun Sun v Dato' Yip Yee Foo* [2013] 6 MLJ 523; [2013] 2 AMCR 350 the court ruled it was not credible for the appellant who only came to know the respondent for less than a month to have lent a large sum of money in the amount of RM6,500,000. In the instant Tan Boon Keong (who acted for the defendant) was known to Pang (SP3) (who acted on behalf of the defendant) since before 2006. This means when the friendly loan was given by plaintiff (at the recommendation of Pang (SP3)) Tan Boon Keong was known to Pang (SP3) for about five years — a long period of friendship — which makes it credible that Pang (SP3) responded favourably to Tan Boon Keong's request for loan as the defendant was facing financial difficulty and gave a friendly loan of RM600,000 as requested. Moreover at the same time MME was expecting some payment in consideration of works they carried out for Warni Kukuh Sdn Bhd; and

(b) in *Kam Seng Realty Sdn Bhd v Dato Tai Fatt Yew & Anor* [2012] 7 MLJ 825 there was documentary evidence to support the plaintiff's claim of the friendly loan including copy of cheque, letters exchanged between solicitors and minutes of the plaintiff's board meeting approving and ratifying the loan. In the instant case there is evidence of P2, P3 and also the police report (at p 314 *rekod rayuan Bahagian* C) which supports the existence of the friendly loan. Although the police report lodged may not be a contemporaneous document in relation to the friendly loan, Pang (SP3) made specific reference to the court action in respect of the RM550,000 filed against the defendant and the defendant's intimidation and threat in respond to the court action. The legal consequences of making false report which SP3 may face if his report is false indirectly lend support to the genuineness of the report relating to the friendly loan. After all Tan Boon Keong was not called by the defendant to respond or rebut Pang's claim that the persons who threatened or intimidated him was Tan Boon Keong's agents/employee who came to see him to settle the friendly loan only in the amount RM300,000. The adverse inference was rightly invoked against the defendant for failure to call Tan Boon Keong.

This is especially so considering the fact that Tan Boon Keong had averred, via his affidavit affirmed on behalf of the defendant opposing the plaintiff's application for summary judgment, that the facts stated in his affidavit in relation to plaintiff's claim is within his knowledge and true.

[24] In the instant case there is ample evidence to show the oral agreement made between Pang (SP3) on behalf of MME and Tan Boon Keong on behalf of the defendant in respect of the friendly loan. The fact that the plaintiff and Tan Boon Keong does not know each other does not prejudice the plaintiff's case because the evidence shows the loan transaction was done between Pang (SP3) on behalf of MME and Tan Boon Keong on behalf of the defendant. Pang (SP3) who is a partner in MME had obtained the consensus of Khairil Azuan (SP2) the managing director of MME to loan the money to the defendant. As testified by the plaintiff, the day to day running of MME was left entirely to Khairil Azuan (SP2) who had caused for the loan of RM600,000 to be debited from the account of MME and credited into the account of the defendant.

[25] Having ruled that the plaintiff has proven its case the burden shifts on the defendant to rebut the plaintiff's case (*Thong Foo Ching & Ors v Shigenori Ono* [1998] 4 MLJ 585; [1998] 4 CLJ 674). It is therefore incumbent on the defendant to prove the RM600,000 paid to them were commission/procurement fee. The defendant's only witness, SD1, is the CEO in the defendant company to pursue their defence that the RM600,000 is a commission or procurement fee.

[26] Having considered the oral testimony of Lee Yeow Tuck (SD1) (without any other evidence from any other witness) I am of the view SCJ is correct in dismissing the defendant's defence. It is as clear as day that Lee Yeow Tuck (SD1) has no knowledge regarding the commission nor the various projects/contract pleaded in the defendant's defence. This is what the SCJ said in her judgment:

[22] Apabila saya meneliti keterangan Lee saya mendapati keterangan beliau hanyalah penafian semata-mata. Beliau tidak dapat memberikan keterangan secara afirmatif bahawa tujuan wang RM600,000 dimasukkan ke dalam syarikat defendan adalah sebagai bayaran komisen. Beliau juga tidak boleh memberikan keterangan secara afirmatif bahawa wang RM50,000 adalah komisen yang dibayar kepada Pang. Ini adalah kerana menurut keterangan Lee sendiri, beliau tidak mempunyai pengetahuan berkenaan perkara tersebut. Keterangan beliau jika pun ada hanyalah berdasarkan kepada keterangan dengar cakap dari Tan iaitu pengarah defendan. Keterangan sebegini adalah tidak mencukupi dan tidak dapat membantu dan membuktikan kes defendan.

...

[25] Lee sendiri mengakui melalui keterangannya semasa disoal balas bahawa beliau

tidak mempunyai pengetahuan berkenaan komisen yang didakwa berlaku oleh defendan. Keterangan beliau menyatakan seperti ini:

PP: Sepanjang projek ini dikendalikan seperti mana didakwa oleh Pang dan entitinya. Adakah terdapat perbincangan berhubung komisen yang dikenakan ke atas projek-projek tersebut?

SD1: In Pang case I was not involved about the discussion of commission for the project.

PP: Sila rujuk jawapan kamu di QNA 18 penyata saksi kamu, DWS1. Ini adalah apa yang telah kamu nyatakan sebagai balasan Pang bersetuju memberikan defendan fee atau komisen sebagai balasan untuk pemberian projek untuk beliau. Adakah kamu setuju dengan saya, sebentar tadi dalam keterangan kamu, kamu menyatakan bahawa kamu tidak terlibat dalam perbincangan dan ia membawa maksud bahawa kamu tidak mempunyai pengetahuan sama ada komisen wujud atau tidak.

SD1: I was told by Mr Tan.

[26] Berkenaan bayaran RM50,000 Lee juga mengesahkan bahawa beliau tidak mempunyai pengetahuan tentang tujuan pembayaran tersebut. Berikut adalah keterangan Lee:

PP: Adakah kamu mempunyai apa-apa bukti tentang kenyataan pembayaran RM50,000.00 kepada Pang?

SD1: Again, I have no knowledge

PP: Do you agree we can't find any document about payment to Pang at Bundle D

SD1: Yes.

[27] Jelas, Lee tidak tahu menahu berkenaan wang yang menjadi hal perkara di dalam kes ini. Jika beliau mempunyai pengetahuan, keterangannya berkenaan komisen tersebut adalah keterangan dengar cakap dan tidak boleh mencabar dan mengenepikan keterangan secara afirmatif yang telah dikemukakan oleh saksi-saksi plaintif. Oleh yang demikian, saya menolak pembelaan defendan yang mengatakan bahawa kononnya wang tersebut adalah komisen untuk projek-projek yang diberikan oleh defendan kepada Pang.

[27] In this respect the defendant's counsel has cross-examined Pang (SP3) extensively on the various projects which the defendant alleged were secured by the defendant for MME. However nothing came of it as nothing can be deduced from the evidence adduced that the RM600,000 was paid by MME as a consideration to the defendant and Pang (SP3) for securing projects/contracts for MME. Furthermore as rightly pointed out by the SCJ, the project relating to Jalinan Rakyat Sdn Bhd, Komponen Utama Sdn Bhd and Sinar Bekal Sdn Bhd were projects carried out between 2006–2007 whereas MME was established in 2009.

[28] The defendant's counsel submits it was erroneous for the SCJ to have made an adverse inference against the defendant for not calling Tan Boon Keong to testify. It is the defendant's position that the onus is on the plaintiff to call Tan whom the plaintiff claims to have asked for the loan from Pang (SP3). The counsel further submits as a result of the plaintiff's failure to call Tan Boon Keong the plaintiff has failed to discharge the burden of proving their claim.

[29] Under s 101 of the Evidence Act 1950, the plaintiff bears the burden of proving his case and the standard of proof is on balance of probability. Therefore he will have to decide how to go about proving his case especially in deciding the material witnesses who can vouch for the subject matter of his claim in order to prove his case on balance of probability. If by the decision he made the evidence adduced does not substantiate his claim and jeopardise his case then it is a calculated risk on his part.

[30] In the instant case the SCJ accepted the evidence led by Khairil Azuan (SP2) and Pang (SP3) regarding the friendly loan and found:

> ... melalui keterangan lisan yang dikemukakan oleh saksi plaintif terutamanya Pang, mahkamah mempercayai keterangannya sebagai benar. Seperti yang mahkamah nyatakan sebelum ini, keterangan Pang dan Khairul Azuan telah melalui proses soal balas dan keterangan mereka kekal utuh, peguam defendan langsung tidak dapat menggoyahkan keterangan plaintif bahawa tujuan wang RM600,000 tersebut dimasukkan adalah sebagai pinjaman persahabatan dan bayaran RM50,000 adalah bayaran sebahagian kecil pinjaman itu.

[31] In this respect I agree with the plaintiff that the defendant's reliance on *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; [1996] 4 CLJ 1 and *Network Pet Products (M) Sdn Bhd v Royal Canin SAS & Anor* [2013] 8 MLJ 713; [2013] 2 AMCR 908 is misplaced given the finding of fact made by the SCJ in respect of the existence of the oral friendly loan agreement. Besides that, the facts in both cases shows plaintiff relied solely on oral evidence and no documentary evidence adduced to corroborate the plaintiff's claim. In the instant case as stated above, there are sufficient documentary evidence to support the plaintiff's claim in respect of the friendly loan between plaintiff and defendant.

CONCLUSION

[32] In so far as appeal against the judgment for plaintiff is concerned I am of the considered opinion, on the facts, the decision of the SCJ is not plainly wrong or unreasonable. It is evident from her judgment the SCJ had evaluated and assessed the oral testimony adduced and the demeanour of the witnesses. Based on the evidence adduced and the finding of fact made by the SCJ I see no ground for this appellate court to intervene with such decision. I accordingly

dismissed the defendant's appeal against the judgment for plaintiff.

APPEAL AGAINST THE STAY ORDER (COURT OF APPEAL CIVIL APPEAL NO W-04(IM)(NCC)-319–09 OF 2016)

[33] In respect of this appeal, the following background which transpired much earlier before the full trial took place is relevant:

(a) on 9 January 2015 the sessions court entered summary judgment against the defendant for the amount of RM550,000;

(b) on 1 April 2015 the summary judgment was set aside by Justice Lau Bee Lan and the defendant was ordered to deposit RM550,000 as security for the plaintiff's claim. The amount was deposited by the defendant on 14 April 2015 ('first security');

(c) on 27 April 2016 this court ordered for additional security in the amount of RM102,000 ('second security') to be paid into court. Such amount was accordingly paid by the defendant;

(d) on 15 July 2017 when the defendant's appeal was dismissed this court also ordered the defendant's solicitor to submit to the plaintiff's solicitor the original receipt pertaining to the second security payment to enable the plaintiff to withdraw the said security; and

(e) on 15 July 2016 by consent of both parties Justice Lau Bee Lan ordered the defendant's solicitor to submit to the plaintiff's solicitor the original receipt pertaining to payment of the first security to enable the plaintiff to withdraw the said security.

[34] In its application for stay (encl 22) the defendant sought, among others, for the following order:

(a) stay of the order dated 15 July 2016 pending disposal of the defendant's appeal to Court of Appeal; and

(b) the sum of RM550,000 paid by the defendant into court on 13 April 2015 and sum of RM102,000 paid into court on 27 April 2016 be retained with the court until the disposal of the defendant's appeal to the Court of Appeal. Alternatively if the said sums was withdrawn and paid to the plaintiff or the plaintiff's solicitor the said sum is to be retained by the plaintiff's solicitor as stakeholder in its client account.

[35] The defendant's grounds for applying for a stay are:

(a) the judgment sum of RM550,000 and an additional amount of RM102,000 which is supposed to be the interest has been paid into

court. Thus the plaintiff is guaranteed of getting the monies if the appeal is dismissed. The defendant is prepared to provide additional deposit payment into court;

(b) if a stay is not granted and the first security and second security released to the plaintiff, the defendant alleges they will not get back the said money because the testimony given by the plaintiff and his witnesses during the trial shows:

(i) the plaintiff is a pensioner since 2005 and has no source of income besides his pension. The plaintiff is not involve in MME's management and operations;

(ii) via SP2's evidence profits from MME business will be divided between him and SP3. In respect of the friendly loan Khairil Azuan's portion is only 10% while the rest 90% is Pang's portion. If the judgment sum is paid to both of them the defendant will not be able to recover from both of them as they are not parties to the present suit. To recover from the plaintiff would be futile since the plaintiff has no means to pay back the money;

(c) after the filing of the application for stay the defendant paid to their solicitor an amount of RM24,688.77 to cover interest on the judgment sum as at 4 August 2016 and the plaintiff's cost as ordered by the court.

[36] The plaintiff resisted the stay application on the following grounds:

(a) the principles of approbation and reprobation, estoppel and waiver operates against the defendant because via the consent order dated 15 July 2016 the defendant agreed for the plaintiff to withdraw the first security and second security. The defendant is estopped, via the consent order, from restraining or preventing the plaintiff from exercising his right over the judgment sum;

(b) there is no special circumstances which warrant a stay and the balance of convenience tilt towards the plaintiff. The plaintiff submits the amount of security paid is not a full and final settlement of the judgment sum. The plaintiff should not be deprived from the fruits of its litigation especially when the friendly loan was made in 2010. The defendant's allegations that they would not be able to recover the judgment sum is mere inference and presumption without any proof; and

(c) MME as a going concern requires capital to carry on its business.

The law

[37] As regards to stay proceeding, cases of high authorities has held it is incumbent upon the applicant in a stay application to prove there is special

circumstances or special grounds to justify a stay. The Court of Appeal in *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 held:

> ... the special circumstances must be special, not ordinary, common or usual circumstances and that go to the execution of the judgment and not to the validity or correctness of the judgment (or merits of the appeal).

[38] The Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 had this to say:

> As Ian HC Chin JC (as he then was) said in *Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application* [1993] 3 MLJ 514 at p 521; [1993] 4 CLJ 98 at pp 101–102:
>
> > An attempt was made to define special circumstances by Raja Azlan Shah (as His Majesty then was) in the case of *Leong Poh Shee v Ng Kat Chong* [1996] 1 MLJ 86, viz:
> >
> > > Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.
> >
> > The definition only serves to emphasise the fact that there are myriad circumstances that could constitute special circumstances with each case depending on its own facts. I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion of the court whether to grant or stay an execution; making the discretion less of a discretion. This is surely not what discretion is all about.
>
> It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances.

[39] Essentially what amounts to special circumstances would depend on the facts of each case. As in most application for stay, the defendant raises the issue of nugatory to support its application for stay. Although it is a common ground/issue it does not necessarily and automatically means it cannot be considered as a special circumstances. Again, it all depends on the facts and circumstances of each particular case.

The court findings

[40] In the instant case it is purely a case of monetary judgment of RM550,000 and the interest thereto. It is obvious the defendant's grave concern is not able to recoup the RM652,000 (the total amount of the first security and second security) in the event their stay application is not granted.

This grave concern of the defendant is not without merits as there is evidence to indicate that the RM550,000 and RM102,000 when paid to the plaintiff will most probably be utilised either by MME, the plaintiff, Khairil Azuan (SP2) and Pang (SP3):

(a) based on Khairil Azuan (SP2) oral testimony monies paid into the account of MME will be utilised for MME purposes which is a business entity and this is understandable:

PD: Adakah RM50,000 ini dibayar kepada Encik Pang setelah diterima?

SP2: Tidak ada ... Masuk dalam akaun Misi Megah

PD: So sehingga ke hari ini ia masih berada dalam akaun Misi Megah?

SP2: Ya.

PD: So Encik Khairil tidak melakukan apa-apa terhadap jumlah RM50,000 ini?

SP2: Sampai hari ini, mana tahulah. Takut saya ada belanja untuk business ke

Mah: Macam mana?

SP2: Peguam tanya, sehingga ke hari ini ada atau tidak. Tetapi saya pun tak tahu duit itu yang mana satu RM50,000. Duit dalam akaun untuk business, so ada yang saya keluarkan dan masukkanlah. Mungkin sudah digunakan dan mungkin tidaklah

(b) based on the oral testimony of Khairil Azuan (SP2) and Pang (SP3), 10% of the RM550,000 is Khairil Azuan's entitlement and 90% of it is Pang's entitlement.

During cross-examination Khairil Azuan (SP2) testified:

PD: Oleh itu keuntungan atau pendapatan dalam projek akan dibahagikan antara Encik Simple dan Encik Khairil, ya?

SP2: Ya.

PD: Dan bapa Encik Khairil iaitu Encik Abdul Rahman tidak mendapat apa-apa?

SP2: Tak.

PD: Dalam jumlah RM600,000 tersebut, kamu berkemungkinan memiliki 10% sahaja, ya?

SP2: Ya.

Pang (SP3) testified during cross-examination:

PD: Saya cadangkan kepada kamu secara logiknya bahawa

pemindahan RM600,000 ini sebenarnya adalah wang milik kamu kecuali 10 peratus?

SP3: Ya, tetapi dari next profit tersebut.

[41] I concede there is no evidence to show that the plaintiff who is the sole proprietor of MME is in a poverty position. However from his own testimony there is evidence of his financial position, that is, he is a pensioner without any source of income except his pension. To my mind such position is sufficient to raise real concern as to his financial capability to pay back the sum to the defendant in the event the judgment plaintiff obtained against the defendant is overturned.

[42] Being a monetary judgment the defendant is obliged to pay up the judgment sum. Such approach may be deduced from *Ming Ann Holdings Sdn Bhd* where the court held:

> It must be remembered that the judgment is a money judgment. there is not even an allegation, what more evidence, that the respondent is not in a financial position to repay the applicant of need be. And bear in mind that the respondent is Danaharta Urus Sdn Bhd.
>
> The grounds relied on by the appellant are nothing more than 'fear of losing'; fear of losing business, fear of losing customers, fear of losing suppliers, fear of losing goodwill, fear of not being able to collect its debts from third parties, in case the appellant company is wound up. All that the applicant has to do to avoid such 'fears' is to settle the judgment debt.

[43] In the instant case the defendant's concern in relation to the plaintiff's financial capacity (in stark contrast to the financial standing of the defendant in *Ming Ann Holdings Sdn Bhd*) is founded on evidence adduced by the plaintiff during full trial. In so far as the obligation of the defendant to pay the judgment sum, the defendant has demonstrated its willingness and capability to pay the judgment sum, interest and costs awarded to the plaintiff. The defendant deposited into court the judgment sum of RM550,000 and RM102,000. Further thereto, the defendant had paid to the plaintiff's solicitor a sum RM24,688.77 as requested by the plaintiff's solicitor in their letter dated 29 July 2016. The said sum covers the total costs awarded to the plaintiff by the court in respect of various applications made by the parties and interests on the judgment sum RM550,000 as at 4 August 2016. The plaintiff will no doubt be entitle to interest accruing from 5 August 2016 until full payment in the event the defendant's appeal against judgment for the plaintiff is dismissed.

[44] I am of the view the security provided by the defendant is manifest of the defendant's intention not to deprive the plaintiff of his fruits of litigation. It is the best and maximum comfort the defendant can provide to the plaintiff

whilst at the same time pursuing the avenue available to them seeking for a stay pending the outcome of their appeal against judgment for the plaintiff. The security is a guarantee that the judgment sum is available and ready to be released if the defendant's appeal against judgment for the plaintiff is dismissed. The security is also a guarantee that the judgment sum will remain with the court and for the status quo to remain pending the disposal of the defendant's appeal.

[45] As reiterated in the case authorities there are myriad circumstances that could constitute special circumstances and it all depends on the facts of each particular case. Taking into consideration the facts as a whole, the nugatory issue which is founded on unchallenged oral testimony of the plaintiff and his witnesses at the full trial and the defendant's willingness and capability to provide security to guarantee the plaintiff's immediate remedy (in the event the defendant's appeal against the judgment for the plaintiff is dismissed), to my mind are special under the circumstances and therefore the status quo should be preserved.

[46] With regards to the plaintiff's submission that the consent order operates as an estoppel and waiver to the defendant from seeking a stay and the reliefs sought, in light of the factual circumstances and the existence of special circumstances I am of the view the defendant ought not to be barred from seeking temporary relief in the form of a stay and withholding of the payment and release of the first security and the second security. The status quo ought to be maintained in order to ensure the substratum of the appeal is in tact.

CONCLUSION

[47] Premised on the above, I allowed the defendant's application in terms of the prayers sought in encl 22.

Appellant's appeal dismissed; appellant's application in encl 22 allowed.

Reported by Dzulqarnain Ab Fatar